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No. 87-496

In the Supreme Court of the United States

OCTOBER TERM, 1987

CLIFFORD M. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 2(a)(6) of the Uniform Code of Military Justice, 10 U.S.C. 802(a)(6), which grants jurisdiction to a court-martial over members of the Fleet Reserve and Fleet Marine Corps Reserve, is unconstitutional.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-7a) is reported at 24 M.J. 309. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 8a-14a) is reported at 20 M.J. 998.

JURISDICTION

The judgment of the Court of Military Appeals was entered on July 27, 1987. The petition for a writ of certiorari was filed on September 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the Fleet Marine Corps Reserve, was convicted by a general court-martial on three specifications of conspiracy to commit larceny and four specifications of larceny from the Subic Bay Navy Exchange, in violation of Articles 81 and 121 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881 and 921.

Petitioner was sentenced to be dishonorably discharged from the naval service and to forfeit all retainer pay. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence (Pet. App. 8a-14a). Upon discretionary review, the Court of Military Appeals affirmed the findings and sentence (Pet. App. 1a-7a).

1. A person who enlists in the armed forces changes his status from civilian to serviceman by taking the oath of allegiance. *In re Grimley*, 137 U.S. 147, 156-157 (1890); *Wickham* v. *Hall*, 706 F.2d 713, 716 (5th Cir. 1983). Once a person becomes a serviceman, he can honorably terminate his military status only by completing his service obligation and receiving a valid discharge. *United States* v. *Scott*, 11 C.M.A. 646, 648, 29 C.M.R. 462, 464 (1960) (military jurisdiction over a person terminates "with the delivery to him of a valid discharge certificate"); see *United States* v. *Cole*, 24 M.J. 18 (C.M.A. 1987), cert. denied, No. 86-2012 (Oct. 5, 1987); *Wickham* v. *Hall*, 706 F.2d at 716-717; *Wickham* v. *Hall*, 12 M.J. 145, 150 (C.M.A. 1981).

The Fleet Marine Corps Reserve is comprised of enlisted Marines who have completed at least 20 years of active service and have requested a transfer to inactive duty service. 10 U.S.C. (& Supp. IV) 6330.[1] Each member of the Fleet Marine Corps Reserve is entitled, when not on active duty, to "retainer" pay, a salary that is computed on the basis of the basic pay received by a servicemember at the time of his transfer to the Fleet Marine Corps Reserve and

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[1] Members of the Army and the Air Force who complete 20 or more years of active service "retire" pursuant to 10 U.S.C. 3914 and 8914, respectively. As retirees they are subject to court-martial jurisdiction to the same extent as members of the Fleet Reserve and Fleet Marine Corps Reserve. Compare Art. 2(a)(4), UCMJ, 10 U.S.C. 802(a)(4) (retired members of the armed forces who are entitled to pay), with Art. 2(a)(6), UCMJ, 10 U.S.C. 802(a)(6) (members of the Fleet Reserve or Fleet Marine Corps Reserve).

his years of active duty service in the Marines (*ibid.*). A member of the Fleet Marine Corps Reserve is entitled to the same benefits that are enjoyed by all Marines who are on active duty.[2] A member of the Fleet Marine Corps Reserve may also be recalled to active duty in several circumstances: by the Secretary of the Navy under regulations prescribed by the Secretary of Defense; in time of war or national emergency; in time of peace for up to two months of training; and when otherwise authorized by law. 10 U.S.C. 6485; compare 10 U.S.C. (& Supp. IV) 688. After 30 years of service (active plus inactive duty), a member of the Fleet Marine Corps Reserve is automatically transferred to the retired list of the regular Marine Corps. 10 U.S.C. 6331.

2. Petitioner served continuously on active duty in the Marine Corps for 22 years, from May 1956 to July 1978 (2 Tr. 7 (attached Charge Sheet, at 1); 2 Tr. 10). At the end of that period, petitioner was released from active duty and was transferred at his request to the Fleet Marine Corps Reserve (GX 1). At no time did petitioner seek a discharge from his last enlistment, nor was he retained against his will in the Fleet Marine Corps Reserve (2 Tr. 10-13).

During October 1983, petitioner on three occasions conspired with employees of the Subic Bay Navy Exchange to steal electronic equipment from the exchange to be sold off-base in the black market (2 Tr. 39-59, 130-184, 190-219). These conspiracies culminated in the thefts of stereo and video equipment from the Navy exchange.

3. Before trial, petitioner moved to dismiss all charges on the ground that the court lacked personal jurisdiction over him, since he was on inactive duty status. The trial

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[2] These benefits include unlimited privileges at armed services exchanges; free medical and dental care; commissary privileges; military funeral support; and issuance of an identification card reserved for members of the uniformed services.

judge denied the motion (2 Tr. 22). The Navy-Marine Corps Court of Military Review affirmed (Pet. App. 8a-14a). The court ruled that petitioner could validly be court-martialed since he "has never left the Naval Service but instead has merely been 'transferred' (in the exact words of the statute) from one component to another—not retired, not discharged, not separated—and continues to receive 'retainer' pay in return for his membership in the Fleet Marine Reserve" (*id.* at 13a). Relying on decisions from this Court and its own precedents, the Court of Military Appeals also upheld the constitutionality of Article 2(a)(6), UCMJ, 10 U.S.C. 802(a)(6), as applied to petitioner's case (Pet. App. 4a-6a).

ARGUMENT

Petitioner contends that the court-martial lacked personal jurisdiction over him because he was no longer on active duty at the time of the crime or trial. He argues that Article 2(a)(6) of the UCMJ, 10 U.S.C. 802(a)(6), which grants military courts jurisdiction over members of the Fleet Marine Corps Reserve, is unconstitutional. That claim does not warrant review by this Court, for several reasons.

1. First, the question presented in this case has not arisen with the frequency necessary to justify review by this Court. To our knowledge, in the 71 years that Article 2(a)(6) and its predecessors have been in effect, the military has brought only two prosecutions in addition to this case against members of the Fleet Reserve or Fleet Marine Corps Reserve.[3] Moreover, there have been only a

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[3] One case was prosecuted before the UCMJ was adopted in 1950. *United States ex rel. Pasela* v. *Fenno*, 76 F. Supp. 203 (D. Conn. 1947), aff'd, 167 F.2d 593 (2d Cir.), cert. granted, 334 U.S. 857, cert. dismissed, 335 U.S. 806 (1948). The only prosecution other than this case brought under Article 2(a)(6) against a member of the Fleet

handful of prosecutions of other military personnel who have retired, but have not been discharged from the service and who still remain on the military payroll.[4] The question presented by petitioner is therefore of limited practical importance.[5]

2. Second, there is no conflict among the circuits on the issue presented here. The Court of Military Appeals' decision in this case upholding the constitutionality of Article 2(a)(6) as applied to this case is consistent with its earlier decisions in *United States* v. *Bowie*, 14 C.M.A.

Reserve or Fleet Marine Corps Reserve is *United States* v. *Allen*, which is currently pending before the convening authority on a post-trial review of Allen's conviction. Allen, a U.S. Navy Fleet Reservist, was convicted by a general court-martial for his activities in passing classified and unclassified information related to the national defense to intelligence agents of a foreign nation.

[4] Since 1894, there have been a total of only eight prosecutions under Art. 2(a)(4) (or its predecessor) against retired members of the Navy. There have been even fewer such prosecutions by the Army and Air Force. *E.g.*, *United States* v. *Bowie*, 14 C.M.A. 631, 34 C.M.R. 411 (1964); *Chambers* v. *Russell*, 192 F. Supp. 425 (N.D. Cal. 1961) (three court-martialed for offenses committed while on active duty); *United States* v. *Hooper*, 9 C.M.A. 637, 26 C.M.R. 417 (1958); *United States ex rel. Boscola* v. *Bledsoe*, 152 F. Supp. 343 (W.D. Wash. 1956), aff'd per curiam on the basis of the district court's opinion, 245 F.2d 955 (9th Cir. 1957) (two servicemen); *United States* v. *Kearney*, 3 B.R. 63 (1931), cited at Blair, *Court-Martial Jurisdiction Over Retired Regulars: An Unwarranted Extension of Military Power*, 50 Geo. L. Rev. 79, 79 n.3 (1961); *Closson* v. *United States ex rel. Armes*, 7 App. D.C. 460, 470-471 (1896).

[5] The Secretary of the Navy must authorize a prosecution against a member of the Fleet Reserve or the Fleet Marine Corps Reserve under Art. 2(a)(6), or against a retired member of the Navy under Art. 2(a)(4). *Manual of the Judge Advocate General* para. 0116 (Apr. 22, 1987). The Air Force also must obtain authorization from the Secretary of the Air Force to prosecute a retired serviceman under Art. 2(a)(4). Air Force Reg. No. 111-1, *Military Justice Guide* ch. 1, para. 2-5 (July 8, 1985). The relevant Army regulation does not contemplate the prosecution of retired members of that branch of the armed forces. Army Reg. No. 27-10 (July 10, 1987).

631, 34 C.M.R. 411 (1964), and *United States* v. *Hooper*, 9 C.M.A. 637, 639-645, 26 C.M.R. 417, 419-425 (1958), which ruled that a retired serviceman could be court-martialed under a parallel provision of the Code, Art. 2(a)(4), UCMJ, 10 U.S.C. 802(a)(4). The decisions of the Court of Military Appeals are consistent with the Second Circuit's decision in *United States ex rel. Pasela* v. *Fenno*, 76 F. Supp. 203 (D. Conn. 1947), aff'd, 167 F.2d 593, cert. granted, 334 U.S. 847, cert. dismissed, 335 U.S. 806 (1948), and with the Court of Claims' decisions in *Hooper* v. *United States*, 326 F.2d 982, cert. denied, 377 U.S. 977 (1964), and *Runkle* v. *United States*, 19 Ct. Cl. 396, 414 (1884), rev'd on other grounds, 122 U.S. 543 (1887), which also ruled that a retired member of the military who still draws pay is in the armed forces and can be tried by a court-martial. Accord *Closson* v. *United States ex rel. Armes*, 7 App. D.C. 460, 470-471 (1896); *Chambers* v. *Russell*, 192 F. Supp. 425, 427-428 (N.D. Cal. 1961); *Hooper* v. *Hartman*, 163 F. Supp. 437 (S.D. Cal. 1958), aff'd on other grounds, 274 F.2d 429 (9th Cir. 1959); see also *McCarty* v. *McCarty*, 453 U.S. 210, 221-222 (1981) (citations and footnote omitted) ("The retired officer remains a member of the Army * * * and continues to be subject to the Uniform Code of Military Justice."); *United States* v. *Tyler*, 105 U.S. 244, 245-246 (1881) (concluding, in a suit for back pay, that retired officers who receive pay from the government are still members of the military and may be subjected to a court-martial); *Taussig* v. *McNamara*, 219 F. Supp. 757, 759 n.3 (D.D.C. 1963); *Lemly* v. *United States*, 109 Ct. Cl. 760, 763 (1948); *Marvin* v. *United States*, 78 Ct. Cl. 567, 571-572 (1933); W. Winthrop, *Military Law and Precedents* 87 n.27 (2d ed. 1920) (concluding that "retired officers are a part of the army and so triable by court-martial—a fact indeed never admitting of question"); cf. *Kahn* v. *Anderson*, 255 U.S. 1, 7 (1921) (relying on *Tyler* to hold that retired

officers are officers "in the military service of the United States" and therefore are qualified to sit as members of a court-martial).[6]

Petitioner has cited no decision to the contrary. The cases cited by petitioner hold only that court-martial jurisdiction does not extend to civilians or to former servicemen who have severed all their ties to the military and its institutions. *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (civilian military employee working overseas); *Grisham* v. *Hagan*, 361 U.S. 278 (1960) (same); *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960) (military dependent living overseas); *Reid* v. *Covert*, 354 U.S. 1 (1957) (same); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955) (honorably discharged serviceman). Petitioner was never discharged; these cases are therefore inapposite.

3. Finally, the decision below is correct. The Constitution vests in Congress the authority to regulate "the land and naval Forces" (Art. I, § 8, Cl. 14), and that authority includes the power to establish courts-martial and to define their jurisdiction. *Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 3; *Kinsella* v. *United*

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[6] Other courts have also concluded that a retired officer is a member of the military under a variety of other statutes. See *Morgenthau* v. *Barrett*, 108 F.2d 481, 484-485 (D.C. Cir. 1939) (statute disqualifying members of the service from certain employment in the Treasury Department); *White* v. *Treibly*, 19 F.2d 712, 713 (D.C. Cir. 1927) (statute authorizing involuntary commitment of insane officers); *United States* v. *Gillmore*, 189 F. 761 (S.D.N.Y. 1911) (L. Hand, J.).

The decision in *United States ex rel. Boscola* v. *Bledsoe, supra*, is not to the contrary. There, the court ruled that the armed forces lacked statutory authority to recall a retired serviceman to active duty for the purpose of court-martialing him. 152 F. Supp. at 347. The court did not address the question whether the court-martial itself was unlawful. See *ibid.*; 245 F.2d at 955.

States ex rel. Singleton, 361 U.S. at 246. Under that authority, a court-martial may exercise jurisdiction over any crime committed by a servicemember. *Solorio* v. *United States, supra*. At the same time, a court-martial may not exercise jurisdiction over a crime committed by a former servicemember who has severed all ties to the military. *United States ex rel. Toth* v. *Quarles, supra*. That principle, however, applies only to persons, unlike petitioner, who are fully and finally separated from military service.

The Fleet Reserve and Fleet Marine Corps Reserve are inactive branches of the Navy and Marine Corps that were created by Congress pursuant to its authority "[t]o provide and maintain a Navy" (U.S. Const. Art. I, § 8, Cl. 13; see 10 U.S.C. 5001(a)(1) and (2), 6330, and 6331; *United States ex rel. Pasela* v. *Fenno, supra*). These Reserves are an expression of Congress's judgment that the nation's military needs are served by offering servicemen who have completed a lengthy period of military service the opportunity to request a transfer to an inactive duty status rather than be discharged. The Reserves are composed of trained personnel who are subject to recall to active duty.[7] A serviceman who belongs to the Fleet Marine Corps Reserve therefore is not in the same position as a former serviceman who has completely severed his ties to the military.

Congress's judgment that members of the Fleet Marine Corps Reserve should be subject to the UCMJ is entirely reasonable. The preparedness of Reservists depends in part on their state of discipline, and requiring such persons

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[7] The salary paid to members of the Reserves is not simply a reward for their past services, but a means of paying present compensation to assure their availability and preparedness for future contingencies. *United States ex rel. Pasela* v. *Fenno*, 167 F.2d at 595; *United States ex rel. Pasela* v. *Fenno*, 76 F. Supp. at 207; *United States* v. *Hooper*, 9 C.M.A. at 645, 26 C.M.R. at 425; see *Haynes* v. *Miller*, 679 F.2d 718 (7th Cir.), cert. denied, 459 U.S. 970 (1982).

to be subject to the UCMJ is a reasonable means of enforcing that discipline.

History supports that conclusion. Retired army and naval officers have been subject to court-martial jurisdiction since the Civil War. Act of Aug. 3, 1861, ch. 42, §§ 18, 24, 12 Stat. 290, 291; Rev. Stat. §§ 1256, 1457 (1878 ed.). Article 2(a)(6), in particular, traces its lineage to the Naval Service Appropriations Act of 1916, ch. 417, 39 Stat. 589-591. See also Naval Reserve and Marine Corps Reserve Act of 1925, ch. 374, §§ 6, 10, 43 Stat. 1081-1082, 1083; Naval Reserve Act of 1938, ch. 690, § 6, 52 Stat. 1176. Before enacting Article 2(a)(6) of the UCMJ in 1950, Congress considered the testimony of several witnesses that court-martial jurisdiction over persons in an inactive duty status was unnecessary and unfair and should be limited. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 706, 749, 864-870 (1949); *Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 329-330 (1949). Congress rejected the argument that these persons were simply pensioners who were no longer members of the armed forces in favor of the conclusion that these persons were still members of the military who receive lesser pay for current but reduced services and thus should continue to be subject to court-martial jurisdiction. Because "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military" (*Solorio* v. *United States*, slip op. 12) and because " 'judicial deference * * * is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged' " (*ibid.* (citation omitted)), Congress's judgment on this subject is entitled to respect from the courts.

Petitioner has never been discharged from his last enlistment (Tr. 10-13); in fact, he concedes (Pet. 5) that he is a member of the Fleet Marine Corps Reserve. Moreover, petitioner does not dispute that the Fleet Marine Corps Reserve is a part of the military. Petitioner therefore remained a member of the military in an inactive duty status at the time of his crimes and his trial. He was free to resign from the Fleet Marine Corps Reserve and to receive a discharge at any time. Op. Judge Advocate Gen. of the Navy, JAG:131.5, at 6 (May 11, 1971) (reproduced at Gov't C.A. Br. App. II). Had petitioner done so, he would no longer have been subject to the UCMJ and, correspondingly, would not have been entitled to the benefits that members of the Fleet Marine Corps Reserve earn by their service. There is no unfairness in respecting petitioner's judgment that the benefits of remaining in the Fleet Marine Corps Reserve outweighed the cost.[8]

Petitioner argues (Pet. 9-10) that "membership in the Fleet Reserve or Fleet Marine Corps Reserve is not military 'status' at all, but merely an administrative convenience," because it is an inactive duty status.[9] Petitioner

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[8] Petitioner contends (Pet. 8) that "the 'voluntary' aspect of [his] decision to join the Fleet Marine Corps Reserve should not be overemphasized." But petitioner's decision to be transferred to the Fleet Marine Corps Reserve rather than to be discharged clearly is significant if not largely dispositive even under petitioner's own theory. Petitioner concedes (*id.* at 9) that a person can subject himself to court-martial jurisdiction by signing an agreement to submit himself to its authority. That procedure is not materially different from what happened here. Petitioner voluntarily accepted a transfer to the Fleet Marine Corps Reserve (*id.* at 5). Petitioner therefore consented to his status as a member of the Fleet Marine Corps Reserve, just as he consented to his original status as a Marine on active duty.

[9] Petitioner erroneously suggests (Pet. 6) that "cases arising in the land or naval forces" are exempt from the Fifth Amendment requirement of indictment by a grand jury only when a case arises "in actual service in time of war or public danger." The latter phrase refers only

erroneously equates *military* status (and therefore amenability to court-martial jurisdiction) with *active duty* status. The difference between active and inactive duty status, however, is entirely a creation of statute. Congress drew a different distinction for purposes of court-martial jurisdiction, and that distinction is binding as long as it is within Congress's power under Clauses 13 and 14. For the reasons discussed above, the line drawn by Congress is within its constitutional authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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to the "Militia" of the states, not to the "land and naval forces" of the United States. *Johnson* v. *Sayre*, 158 U.S. 109 (1895).

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